me Court, U.S.
I L E D

No. 00-576 OCT 10 2000

OFFICE OF THE CLERK

# In The Supreme Court of the United States

---

**NORFOLK SHIPBUILDING & DRYDOCK CORPORATION,**
*Petitioner,*

**v.**

**THEODORE FAULK, NEWPORT NEWS SHIPBUILDING AND DRY DOCK CO. and DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,**
*Respondents.*

---

**On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit**

---

## PETITION FOR WRIT OF CERTIORARI

---

**Gerard E.W. Voyer (VSB No. 4372)**
**Richard W. Zahn, Jr. (VSB No. 35975)**
**Counsel of Record**
**TAYLOR & WALKER, P.C.**
**1300 First Virginia Tower**
**555 Main Street**
**Norfolk, Virginia 23514**
**(757) 625-7300**

***Counsel for Petitioner***

LANTAGNE LEGAL PRINTING
801 East Main Street Suite 100 Richmond, Virginia 23219 (800) 847-0477

87 pp

## QUESTION PRESENTED

1. WHETHER THE FOURTH CIRCUIT ERRED IN HOLDING THAT AN EMPLOYER MUST PRODUCE SUBSTANTIAL EVIDENCE THAT AN EXPOSURE TO A HAZARDOUS SUBSTANCE NOT ONLY DID NOT CAUSE, BUT COULD NOT HAVE CAUSED, INJURY IN ORDER TO REBUT THE SECTION 20(A) PRESUMPTION UNDER THE LONGSHORE HARBOR WORKERS' COMPENSATION ACT.

## PARTIES TO THE PROCEEDING

All parties appear in the caption of the case.

## TABLE OF CONTENTS

QUESTIONS PRESENTED ..... i
PARTIES TO THE PROCEEDING ..... ii
TABLE OF CONTENTS ..... iii
TABLE OF AUTHORITIES ..... iv
OPINIONS BELOW ..... 1
JURISDICTION ..... 1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED ..... 1
STATEMENT OF THE CASE ..... 2
REASONS FOR GRANTING THE PETITION ..... 3
CONCLUSION ..... 5

APPENDIX

## TABLES OF AUTHORITIES CITED

**CASES:** **PAGES:**


Delvechio v. Bowers, 296 U.S. 280, 186 (1935) ..... 4

Graham v. Newport News Shipbuilding and Dry Dock Co., 13 B.R.B.S. 336 (1981) ..... 4

Kelaita v. Triple A Machine Shop, 13 B.R.B.S. 326 (1981) 4

Lacey v. Four Corners Pipe Line, 17 B.R.B.S. 139 (1985) .. 3

U.S. Industries/Federal Sheet Metal,Inc. v. Director, OWCP (Riley), 455 U.S. 608, (1982) ..... 5

U.S. Industries/Federal Sheet Metal,Inc. v. Director, OWCP (Riley), 455 U.S. 608, 614 (1994) ..... 5


**STATUTES AND RULES:**


28 U.S.C §1254(1) ..... 1

33 U.S.C §920 ..... 1

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

## OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit, decided July 11, 2000, is attached as Appendix 1. The Decision and Order of the Administrative Law Judge is attached as Appendix 2. The Decision of the Benefits Review Board is attached as Appendix 3.

## JURISDICTION

The Opinion of the United States Court of Appeals for the Fourth Circuit was issued on July 11, 2000. No Petition for Rehearing was filed. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

33 U.S.C. §920. Presumptions

In any proceeding for the enforcement of a claim for compensation under this Act it shall be presumed, in the absence of substantial evidence to the contrary - -

(a) That the claim comes within the provisions of this Act.

(b) That sufficient notice of such claim has been given.

(c) That the injury was not occasioned solely by the intoxication of the injured employed.

(d) that the injury was not occasioned by the willful intention of the injured employee to injure or kill himself or another.

## STATEMENT OF THE CASE

Claimant was employed as a shipfitter by Newport News Shipbuilding and Drydock Co. between January, 1973 and November, 1978. During this time frame, he cut asbestos cloth without the use of a respirator and was otherwise exposed to asbestos dust.

Between 1978 and November, 1996, claimant was employed at Norshipco, where he is aware of only one exposure to asbestos - - an occasion in October or November, 1996 in which an asbestos pipe cover was ripped. Although plaintiff was not in the area when the rip occurred, he did enter the area later with a respirator.

On November 27, 1996, plaintiff was diagnosed with peritoneal mesothelioma, caused at least in part by airborne exposure to asbestos, and was permanently and totally disabled.

On January 21, 1997, plaintiff filed a claim under the Longshore Harbor Workers' Compensation Act for permanent total disability benefits because of "asbestos related lung disease" against both Norshipco and Newport News Shipbuilding and Drydock Co.

On October 1, 1997, an Administrative Law Judge, Daniel A. Sarno, conducted a hearing in this matter. By Decision and Order dated April 28, 1998, and filed with the Office of the District Director, Fifth Compensation District, on

May 1, 1998, Judge Sarno found that Norshipco was the responsible employer and that it was not entitled to benefits under Section 8(f) of the Act.

Norshipco, by counsel, timely filed the Petition for Review on May 12, 1998. In its May 17, 1999, Decision and Order, the Benefits Review Board affirmed the finding that Norshipco was the responsible employer and that it was not entitled to relief under Section 8(f) of the Act.

On June 3, 1999, Norshipco, by counsel, timely filed the Petition for Review with the United States Court of Appeals for the Fourth Circuit. On July 11, 2000, the United States Court of Appeals for the Fourth Circuit held that unresolved medical evidence that the only asbestos "exposure" during Petitioner's employment with Norshipco did not cause the disease was not sufficient to rebut the presumption that Norshipco was liable as the last responsible employer where Norshipco did not introduce evidence that the exposure could not have caused the disease.

## REASON FOR GRANTING PETITION

The opinion of the Fourth Circuit Court of Appeals conflicts with the opinions of this Court and is inconsistent with the opinions of other United Stated Circuit Courts of Appeal.

Section 20(a) of the Longshore Harbor Workers' Compensation Act provides that when a claimant establishes that he has suffered harm and that working conditions existed which could have caused the harm, there arises a rebuttable presumption that the working conditions did, in fact, cause the harm. Lacey v. Four Corners Pipe Line, 17 B.R.B.S. 139 (1985);

Graham v. Newport News Shipbuilding and Dry Dock Co., 13 B.R.B.S. 336 (1981); Kelaita v. Triple A Machine Shop, 13 B.R.B.S. 326 (1981). To rebut this presumption, they employer must produce substantial evidence that the claim does not "arise out of and in the course of employment." 33 U.S.C. 902(2). Upon the introduction of such evidence, the presumption falls out of the case and the burden is on the claimant to produce evidence on the issue of causation. Delvechio v. Bowers, 296 U.S. 280, 186 (1935).

In the matter *sub judice*, Faulk was diagnosed on November 27, 1996 with peritoneal mesothelioma caused, at least in part, by exposure to airborne dust and fibers. He made a claim under the LHWCA Newport News Shipbuilding & Drydock Co., where he had been employed prior to 1978 cutting asbestos cloth and working others using asbestos materials. Faulk also made a claim against Norshipco where he had been an employee after 1978 but where he was only exposed to asbestos on one occasion in October or November, 1996, after he had begun experiencing symptoms of peritoneal mesothelioma but before being diagnosed. Norshipco offered medical testimony that this exposure did not cause the peritoneal mesothelioma.

In affirming the opinions of the Benefits Review Board, the Fourth Circuit Court of Appeals held that competent medical testimony that the exposure at Norshipco did not cause Faulk's disease was insufficient to rebut the §20(a) presumption where Norshipco offered no evidence that the exposure "did not have the potential to cause the disease or was in insufficient quantities to cause the [disease]." In so ruling, the Fourth Circuit confuses an element necessary for claimant to establish a prima facie case

(that the exposure had the potential to cause harm) with the presumption itself (that the exposure did not cause harm).

Once the claimant establishes that an exposure had the potential to cause harm, he receives the benefit of the §20(a) presumption that the exposure did, in fact, cause harm. It is this second fact - - that the exposure did cause harm - - which is a necessary element for the claimant to prevail under the LHWCA. U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP (Riley), 455 U.S. 608, 614 (1994). It follows, therefore, that the employer must offer substantial evidence to rebut this second fact - - that the exposure did cause harm. Norshipco did so.

Requiring Norshipco to offer evidence that the exposure did not have the potential to cause the injury, it appears to conflict with this Court's holding in U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP (Riley), 455 U.S. 608, (1982), (in order to be compensable, an injury must be caused by employment). Once Norshipco offered evidence severing the causal connection between Faulk's employment and the disease, the presumption under §20(a) that the injury was caused by the employment dropped from the case and the burden again rested with the plaintiff to come forth with some evidence that caused or contributed to cause the disease.

## CONCLUSION

For the reasons stated above, this Court should grant the Petition for Writ of Certiorari and reverse the Fourth Circuit Court of Appeals.

Respectfully submitted,
**NORFOLK SHIPBUILDING & DRYDOCK CORP.**

**By** _____
**Of Counsel**

Gerard E.W. Voyer (VSB No. 4372)
Richard W. Zahn, Jr. (VSB No. 35975)
TAYLOR & WALKER, P.C.
1300 First Virginia Tower
555 Main Street
P.O. Box 3490
Norfolk, Virginia 23514-3490
(757) 625-7300